IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.12.2007

CORAM:

The HONOURABLE MR.JUSTICE V. DHANAPALAN

W.P.No.19445 of 2007

B.Shanmugam ... Petitioner

vs.

Union Bank of India,
Nungambakkam Branch,
No.37, College Road,
Chennai 600 006. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus, forbearing the respondent from proceeding under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, without honouring the petitioner's One Time Settlement (OTS) offer accepted by the respondent through the letter dated 29.01.2007, in furtherance of which the petitioner effected the payment of Rs.7.5 Lacs demanded by the respondent, on 13.03.2007 and 29.05.2007.

For Petitioner : Mr.K.M.Vijayan, Senior Counsel
for M/s.Ahmad Associates

For Respondent : Mr.N.V.Srinivasan
for M/s.N.V.S.Associates

O R D E R

With the consent of the learned counsel on either side, this writ petition is taken up for final disposal.

2. The case of the petitioner in a nutshell, is as under:

(i) The respondent Bank extended loan facility to the core of Rs.3,00,000/- to a partnership firm, namely, "Adworld", in which the petitioner herein is also a partner. The accounts of their subsequently started partnership firm, namely, "Karvin Corporation" was also operated with the respondent Bank.

(ii) While the outstanding of M/s.Adworld as on 10.10.1997 was arrived at Rs.20,35,000/-, a sum of Rs.3,37,660/- was repaid and the remaining due was Rs.17,83,578/-. Thereafter, the said

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

remaining due was remitted by effecting a total payment of Rs.17,85,000/- on 17.05.1999 through the sale of a property, which was already mortgaged with the respondent Bank. Even after remitting the balance amount, the respondent Bank arbitrarily adjusted a sum of Rs.5,00,000/- towards penal interest.

(iii) This being the position, in the year 2002, the respondent Bank filed O.A.No.118 of 2002 in DRT-I against the two firms, the partners and guarantors for a total claim of Rs.1,03,86,184.78 paise, inclusive of interest up to 08.03.2002. The property which was already sold was also wrongly included as 'B' Schedule property in the said O.A.No.118 of 2002 and the same was amended in an application filed by the respondent Bank in I.A.No.159 of 2003 vide order dated 10.03.2005.

(iv) In a meeting that took place among the borrowers and the respondent Bank on 10.11.2006, an OTS offer was made and a sum of Rs.30,00,000/- was insisted to be paid by the respondent Bank towards OTS, and though the petitioner expressed his willingness to pay Rs.30,00,000/- as OTS before 10.03.2007, the respondent Bank demanded 25% of the offer amount as down payment. Subsequently thereto, the borrower arranged the repayment of Rs.5,00,000/- and in the accompanying covering letter dated 13.03.2007, promised to pay the remaining amount of Rs.25,00,000/- towards full and final settlement by 31.03.2007. Despite the balance down payment of Rs.2.5 lakhs being made by the petitioner on 29.05.2007 through Registered Post, the respondent Bank contemplated further action based on the notice dated 02.01.2007 issued under Section 13(2) of the SARFAESI Act.

(v) Since the respondent Bank initiated steps against him in contravention of Section 13(3A) of the SARFAESI Act, after having failed to communicate within one week of the receipt of the representation dated 13.03.2007, the petitioner has now approached this Court for an efficacious remedy.

3. In the counter affidavit, the respondent Bank has negated the averments of the petitioner and has stated as under:

(i) The petitioner is one of the partners of M/s.Adworld, a partnership firm carrying on business in Chennai and also a partner in M/s.Karvin Corporation, another firm started by him along with other partners. Both the firms are represented by the petitioner and other partners. M/s.Adworld is engaged in advertising business and M/s.Karvin Corporation is engaged in the export of granite and slate materials. In the year 1988, both the firms approached the respondent bank for certain credit facilities to support their business and the respondent bank considered and granted secured overdraft facility to

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

M/s.Adworld and the partners of M/s.Adworld executed the required loan documents and as per the terms and conditions of the loan documents, they undertook to pay interest at the rate of 15.75% per annum compounded with quarterly rests. In turn, the firms have mortgaged their immovable assets. As they failed to clear the outstanding dues, the respondent bank initiated proceedings and filed an Original Application in O.A. No.118 of 2002 before the Debts Recovery Tribunal - I claiming a sum of Rs.17,26,637.44 with further interest at 15.75% p.a. compounded with quarterly rests from the date of filing the suit, i.e. 08.03.2002 till the date of realisation of the debt along with the cost of the suit.

(ii) Similarly, in respect of M/s.Karvin Corporation, the respondent has claimed a sum of Rs.86,59,547.34 with interest at the rate of 17.75% per annum with quarterly rests in respect of packing credit, foreign bill purchase limit and over drawings in the current account and initiated proceedings by filing an Original Application on 08.03.2002. Thus, the total amount from both the firms as on 08.03.2002 was Rs.1,03,86,184.78 with further interest. That being the position, the bank omitted to mention about the sale of property described in Schedule B to the O.A. No.118 of 2002. The sale was done by the partners with the approval of the bank and the credit received was properly accounted for by the bank and the O.A. was filed for the outstanding amount as on 08.03.2002.

(iii) the allegations of the petitioner that the respondent Bank arbitrarily adjusted a sum of Rs.5,00,000/- towards penal interest and further made a wrong debit of Rs.5,00,000/- are not true.

(iv) there was no commitment on the part of the Bank to accept the petitioner's proposal and that by remitting a sum of Rs.7,50,000/-, the petitioner has unilaterally claimed that the amount remitted by him was towards a full and final settlement of their loans in respect of the two partnership firms.

(v) there was no commitment on the part of the Bank to accept Rs.30,00,000/- offered by the petitioner in full and final settlement of the loan accounts and the Bank has sent a letter stating that their improved offer of Rs.33,00,000/- was also not accepted by the Competent Authority as per their letter dated 02.06.2007 sent by Registered Post Ack. Due.

(vi) the matter has to be argued before the DRT, when the O.A. is taken up for trial and that it is true that the guarantors have raised objections regarding the sale of the property described in 'B' Schedule to the O.A.118 of 2002.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(vii) that there was no commitment on the part of the Bank to offer to receive only Rs.30 lakhs of the dues, when the liability even as per Section 13(2) notice dated 02.01.2007 was more than Rs.1,84,00,000/-.

(viii) the issuance of notice dated 02.01.2007 under Section 13(2) of the SARFAESI Act is in contravention of Section 13(3A) of the SARFAESI Act.

(ix) the Bank is given the statutory right to proceed against the secured assets when the loan becomes a Non Performing Asset (NPA).

According to the respondent Bank, the petitioner and the borrowers are intentional defaulters and they are adopting delaying tactics to prevent the Bank from recovering the legitimate dues and hence, prayed for dismissal of the writ petition.

4. Heard Mr.K.M.Vijayan, learned Senior Counsel for the petitioner and Mr.N.V.Srinivasan, learned Counsel appearing on behalf of the respondent Bank.

5. Learned Senior Counsel for the petitioner contended that so far as the petitioner has satisfied the requirement of the respondent Bank by paying the down payment of 25% of the agreed OTS amount, the respondent Bank cannot approbate and reprobate on their exercise of power under Section 13 of the SARFAESI Act. It was his further contention that the respondent Bank has violated Section 13(3A) of the SARFAESI Act, by failing to communicate within one week of the receipt of the petitioner's representation dated 13.03.2007.

6. Learned Senior Counsel further contended that there is a statutory duty contemplated under Section 13(3A) of the SARFAESI Act, which has not been followed by the respondent Bank; therefore, the petitioner has a judicial remedy before this Court to enforce the right as it is statutorily provided. He submitted that the certificate of posting has been sent only on 21.06.2007 and it is not on 02.06.2007 as contended by the respondent. Therefore, there is no compliance of the provision under 13 (3A) of the Act.

7. Learned counsel further contended that as per Section 34 of the SARFAESI Act, a Civil Court does not have jurisdiction in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under the Act to determine in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It is also his contention that as per Section 35, the provisions of the Act override other laws and therefore, the statutory rights provided under this Act under Section 13(3-A) have to be enforced only before this

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Court and not before any other forum and the petitioner has got every right to agitate the same before this Court and therefore, the respondent has violated its statutory duty.

8. In support of his contentions, learned counsel for the petitioner has placed reliance on :

(i) a decision of this Court reported in 2007 (4) MLJ 245 in the case of Misons Leather Ltd., rep. by its Managing Director vs. Canara Bank, Chennai, the relevant portion reads, as under:

> "10. We are afraid that the contention is totally mis-conceived. The provisions of Section 17(1) of the Act provides remedy for the borrower/guarantor/mortgagor to challenge the action of the Bank under Section 13(4) of the Act before the Debt Recovery Tribunal. The Debt Recovery Tribunal is required to decide whether the action of the Bank/Financial Institutions, under Section 13(4) is in accordance with the provisions of the Act and the rules framed thereunder. It is open to the borrower/guarantor/mortgagor to demonstrate before the Debt Recovery Tribunal that resort to Section 13 of the Act is not permissible by law. In a given case, the claim of the Bank/Financial Institutions may be barred by limitation or there may be cases, where the adjustment of the amount paid is not reflected in the notice or the calculation of interest may not be in accordance with the contract between the parties. Needless to say that all such grounds, which render the action of the Bank/Financial Institutions illegal can be raised in the proceedings under Section 17 of the Act before the Debt Recovery Tribunal."

(ii) yet another decision of this Court reported in 2007(2) CTC 397 in the case of Industrial Development Bank of India Ltd., Chennai - 15 vs. Kamaldeep Synthetics Ltd., Chennai, the relevant portion reads as follows:

> "8. In Mardia Chemicals case, the Supreme Court held that under Section 13(2) of the SARFAESI Act, it is incumbent upon the secured creditor to serve sixty days notice before proceeding to take action under sub-section (4) of Section 13 of the SARFAESI Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief that may be, must be communicated to the borrower. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the DRT under Section 17 of the SARFAESI Act, at that stage. The Court explained that communication of reasons not to accept the objections of the borrower is for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

creditor, who intends to resort to harsh steps of taking over the management/business of namely, the secured assets without intervention of the Court. Such person in respect of whom steps under Section 13(4) of the SARFAESI Act are likely to be taken cannot be denied the right to know the reason for non-acceptance of his objections. This will be in keeping with the concept of right to know the lender's liability of fairness to keep the borrower informed particularly of the developments before taking measures under sub-section (4) of Section 13 of the SARFAESI Act. The Court, however, made it clear that as per the provisions of the SARFAESI Act, the borrower will not be entitled to challenge the reasons communicated or the likely action of the secured creditor at the stage of communication of reasons, unless his right to approach the DRT as provided under Section 17 of the SARFAESI Act matures on any measure having been taken under sub-section (4) of Section 13 of the SARFAESI Act.

9. The Proviso to sub-section (3-A) of Section 13 of the SARFAESI Act makes it abundantly clear that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the DRT under Section 17 of the Court of District Judge under Section 17-A of the Act. Thus, the basic object of sub-section (3-A) of Section 13 of the SARFAESI Act is to ensure the element of transparency and fair play in the implementation of the provisions of the SARFAESI Act. Learned counsel for the respondent is unable to demonstrate prejudice or loss that is likely to be caused to the respondent by reason of the possession notice given to it, earlier to the communication of the reasons for non-acceptance of the objections raised by the borrower. In our opinion, at the most, it would amount to a mere irregularity and having regard to the facts and circumstances of the case, we are satisfied that the appellant-bank has substantially complied with the provisions of Section 13(3-A) of the SARFAESI Act."

9. Mr. N.V. Srinivasan, learned counsel for the respondent bank, at the outset, contended that the writ petition is not maintainable in view of the settled proposition laid down by the Supreme Court as well as this Court. He has strongly contended that in the absence of any pleading in respect of Section 13(3-A) of the SARFAESI Act, whether such a plea can be considered when there is a reply under Section 13(3-A) of the Act. Learned counsel further contended that on receipt of the notice, the petitioner as well as the other guarantors/mortgagors did not respond to the notice and as the stipulated period of 60 days is already over, the respondent Bank is empowered to issue possession notice under Section 13(4) of the SARFAESI Act, 2002 and take appropriate steps. According to the learned counsel, when there is alternative remedy of approaching the Debts Recovery Tribunal as per the provisions of Section 17 of the SARFAESI Act

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

2002, the petitioner ought not to have approached this Court and therefore, he prayed for dismissal of the writ petition.

10. Learned counsel for the respondent also assailed the argument advanced by the learned Senior Counsel appearing for the petitioner that there is no question of invoking the Civil Court's jurisdiction under Section 34 of the Act and also the over-riding effect under Section 35 of the Act as the proceedings initiated under Section 13(2) have already been proceeded with against the petitioner and the same are pending. Lastly, he submitted that all the provisions contemplated under the Act have been scrupulously followed by the respondent bank; notices were issued under Section 13(2), 13(3-A) and also 13(4) of the Act and therefore, the scope of prayer cannot be granted without any pleading or specific averment as the petitioner has not established his legal right and he can very well contest the matter before the Debts Recovery Tribunal.

11. In support of his contentions, learned counsel for the respondent Bank has placed reliance on the following decisions :

(i) The Supreme Court, in a decision reported in AIR 2004 SC 2371 in the case of Mardia Chemicals Ltd. etc. vs. Union of India (UOI) and others etc. has held as under:

> 40. Now coming to Section 17, it provides for filing of an appeal to the Debt Recovery Tribunal within 45 days of any action taken against the borrower under sub-section (4) Section 13 of the Act. It reads as under:
>
> > "17. Right to appeal: (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken.
> >
> > (2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of section 13:
> >
> > Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.
> >
> > (3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

It is thus clear that an appeal under sub-section (1) of Section 17 would lie only after some measure has been taken under sub-section (4) of Section 13 and not before the stage of taking of any such measure. According to sub-section (2), the borrower has to deposit 75% of the amount claimed by the secured creditor before his appeal can be entertained.

41. So far jurisdiction of Civil Court is concerned we find that there is a bar to it as provided under Section 34 of the Act quoted below :

"34. Civil Court not to have jurisdiction – No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)".

50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr.Salve one of the counsel for respondents that there would be no bar to approach the civil court. Therefore, it cannot be said no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

The bar of civil court thus applies to all such matter which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purpose of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that Stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the Court."

(ii) In 2005 (1) LW 58 in the case of TIIC vs. Millenium Business Solutions Pvt. Ltd., this Court has held as under:

"5. It is alleged that the petitioner came forward to raise funds by disposing of the properties offered as collateral securities and its Managing Director presented a proposal to TIIC for one time settlement. The petitioner further alleged that it offered a proposal to pay Rs.2 crores against the release of all the collateral securities, and was awaiting for the approval and confirmation from TIIC. The petitioner also alleged that this proposal of one time settlement of Rs.2 crores against the release of collateral properties has not been considered by the TIIC till date. The petitioner prayed for rescheduling of the repayment of the loan and interest.

8. No doubt Article 226 on its plain language states that a writ can be used by the High Court for enforcing a fundamental right or for 'any other purpose'. However, by judicial interpretation the words 'any other purpose' have been interpreted to mean the enforcement of any legal right or performance of any legal duty, vide Calcutta Gas Company vs. State of West Bengal, MANU/SC/0063/1962. In the present case, the writ petitioner has really prayed for a mandamus to the Corporation to grant it a one time settlement, but no violation of any law has been pointed out. In our opinion, no such mandamus can be issued in this case, and hence the writ petition should not have been entertained. A mandamus is issued only when the petitioner can show that he has a legal right to the performance of a public duty by the party against whom the mandamus is sought.

10. ... "Therefore, there must be legal right with the party asking for the writ to compel the performance of some statutory duty cast upon the authorities. The petitioners have not been able to show that there is any statute or rule having the force of law which casts a duty on the UPFC to accept the proposal of one time settlement made by a borrower whereunder he has given his own terms. It is important to note that at the time when the loan was disbursed to the petitioners, a contract was entered into by them which provided for the rate of interest and mode and manner of payment. The amount of instalment and the date by which it had to be paid was also mentioned therein. The UPFC is not acting contrary to the terms of the contract

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

which has been entered into between the parties. What the petitioners want now is that their proposal for one time settlement which contains terms advantageous to them, specially a rate of interest lesser than what they had agreed upon at the time of entering into the contract and disbursement of the loan, be accepted. The State Financial Corporations Act, which governs the working of the UPFC, does not contain any provision for entering into a one time settlement. A Court cannot issue any direction to a party to enter into a compromise or settlement. By the very nature of things a settlement involves consent and it is a voluntary act of the party. In a matter where a creditor is enforcing its liability upon the debtor, the debtor has no legal right to claim that the claim be settled on favourable terms proposed by him whereby the claim of the creditor is reduced. Therefore, in our opinion, the prayer made by the petitioners that this Court should issue a writ of mandamus to the respondents to accept the proposal of one time settlement made by them cannot be granted as it does not come within the principles on which a writ of mandamus can be issued under Article 226 of the Constitution.

13. It was further held in Haryana Financial Corporation Case, (supra) that :

"The relationship between the Corporation and the borrower is that of creditor and debtor. That basic feature cannot be lost sight of. A Corporation is not supposed to give loan and then to write off as a bad debt and ultimately to go out of business. As noted above, it has to recover the amounts due so that fresh loans can be given. In that way industrialization which is the intended object can be promoted. It certainly is not and cannot be called upon to pump in more money to revive and resurrect each and every sick industrial unit irrespective of the cost involved. That would be throwing good money after bad money. As was rightly observed in Gem Cap's case, MANU/SC/0481/1993, promoting industrialisation does not serve public interest if it is at the cost of public funds. It may amount to transferring public money to private account."

18. Before parting with the case we would like to mention that recovery of tens of thousands of crore rupees of loans of banks and financial institutions has been held up by Court orders under Article 226 proceedings which were really unwarranted. However, much sympathy a Court may have for a party, a writ Court must exercise its jurisdiction on well settled principles, and not on mere sympathy or compassion. No doubt, there may be hardship to a party, but unless violation of law is shown the Court cannot interfere. Holding up recoveries of loans by unwarranted Court orders is causing incalculable harm to our economy, since unless the loan is recovered a fresh

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

loan cannot be granted to needy persons. The Courts must keep these considerations in mind.

(iii) This Court, in 2006 (2) MLJ 134 in the case of D.Ravichandran vs. Manager, Indian Overseas Bank, Coimbatore and another, has held as under:

"13. In a sense the notice under section 13(2) of the Securitisation Act is really a show cause notice, and ordinarily this court does notice interfere with show cause notice. The notice under Section 13(2) of the Securitisation Act really does not affect any right or liability of the action because by itself the notice does not affect any right or liability of the borrower. Hence, challenge to the notice under section 13(2) of the Securitisation Act is premature, since it is possible that the secured creditor may be satisfied with the reply of the borrower to the aforesaid notice and may drop the proceedings. Hence all the writ petitions challenging the notice under Section 13(2) of the Securitisation Act are dismissed on the ground that the writ petitions are premature, and the petitioners have an alternative remedy of raising all the points which they are raising in these writ petitions in their reply to the Page 778 notice under Section 13(2) of the Securitisation Act. As already stated above, the secured creditor must decide the objection of the borrower to the notice under Section 13(2) of the Securitisation Act by a reasoned order, and if the objection is rejected the rejection order must be communicated.

From the above observations, it is clear that the borrower cannot approach the court or any other forum at the interlocutory stage of the proceedings, that is from the issue of notice under Section 13 (2) till the final action taken under Section 13(4) of the Act. If the Supreme Court wants to give that scope of approaching the courts or other forum even at the interlocutory stage itself, it could have spelt out in the order itself, but there is no such observations from the Supreme Court. Therefore, I am unable to appreciate the contention of the learned senior counsel for the petitioner that the writ petition is maintainable even as against a notice issued under Section 13(2) of the said Act."

WEB COPY

(iv) In AIR 2007 SC 712 in the case of Transcore vs. Union of India, the Supreme Court has held as under:

"8.... After the judgment of this Court in Mardia Chemicals, the amending Act 30 of 2004 was inserted. By the said Act 30 of 2004, Section 19(1) of the DRT Act was recasted simultaneously with Section 13 of the NPA Act, 2002. These amendments were made in order to enable the banks/FIs to

https://hcservices.ecourts.gov.in/hcservices/

withdraw with the permission of DRT , the O.As. made to it and thereafter take action under the NPA Act. In the judgment in Mardia Chemicals (supra) this Court observed that, in cases where a secured creditor has taken action under Section 13(4), it would be open to the borrower to file an application under Section 17 of the NPA Act. In the said judgment, this Court further observed Page 5328 that if the borrower, after service of notice under Section 13(2) of the NPA Act, raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered by the bank/F1 with due application of mind and reasons for not accepting the objections briefly must be given to the borrower. In the said judgment, it is further stated that the reasons so communicated shall only be for the purposes of information/knowledge of the creditor and such reasons will not give him any right to approach the Tribunal under Section 17 of the NPA Act. The appellant herein (M/s.Transcore) mainly relied on the said reasons given by this Court in Mardia Chemicals (supra) in support of his contentions that the Notice dated 06.01.2003 under Section 13(2) of NPA Act was merely a show cause notice and it did not constitute "action" under the NPA Act and, therefore, the said Bank was obliged statutorily to apply for withdrawal of O.A.No.354/99 before invoking the NPA Act.

18. ... The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability. Section 13(2) deals with liquidation of liability. Section 13 deals with enforcement of security interest, therefore, the remedies of enforcement of security interest under the NPA Act and the DRT Act are complementary to each other. There is no inherent or implied inconsistency between two remedies under the two different Acts. Therefore, the doctrine of election has no application in this case. Section 13(3) inter alia states that the notice under Section 13(2) shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank/FI. In the event of non-payment of secured debts by the borrower, notice under Section 13(2) is given as a notice of demand. It is very similar to notice of demand under Section 156 of the Income Tax Act, 1961. After classification of an account as NPA, a last opportunity is given to the borrower of sixty days to repay the debt. Section Chemicals (supra), whereby the borrower is permitted to make representation/objection to the secured

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

creditor against classification of his account as NPA. He can also object to the amount due if so advised. Under section 13 (3-A), if the bank/FI comes to the conclusion that such objection is not acceptable, it shall communicate within one week the reasons for non-acceptance of the representation/objection. A proviso is added to Section 13(3-A) which states that the reasons so communicated shall not confer any right upon the borrower to file an application to the DRT Page 5334 under Section 18. The scheme of Sub-sections (2), (3) and (3-A) of Section 13 of NPA Act shows that the notice under Section 13(2) is not merely a show cause notice, it is a notice of demand.

In our view, Section 17(4) shows that the secured creditor is free to take recourse to any of the measures under Section 13 (4) notwithstanding anything contained in any other law for the time being in force, e.g., for the sake of argument, if in the given case the measures undertaken by the secured creditor under Section 13(4) comes in conflict with, let us say the provision under the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) of the NPA Act which states that the provisions of NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complimentary to each other and, therefore, the doctrine of election has no application to the present case.

(v) In the case of Sri Lakshmi Products vs. State Bank of India, decided by this Court on 23.02.2007, it was held as follows :

"4. The SARFAESI Act is enacted to regulate securities and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The Act enables the banks and FI to realise long term assets, manage problems of liquidity, asset liability mis-match and to improve recovery of debts by exercising powers to take possession of Securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction. The Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. The said Act also empowers the said asset reconstruction companies to take over the management of the business of the borrower. The constitutional validity of the said Act has been upheld in the case of Mardia Chemicals Limited vs. Union of India. In the judgment in Mardia Chemicals, the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Supreme Court held that, in cases where the secured creditor has taken action under Section 13(4), it would be open to the borrower to file an Appeal (Application) under Section 17 of the Act. In the said judgment, the Court further observed that if the borrower, after service of notice under Section 13(2) of the Act, raises any objection or places facts for consideration of the accused creditor, such reply to the notice must be considered by the Bank/FI with due application of mind and reasons for not accepting the objections briefly must be given to the borrower. In the said judgment, it is further held that the reasons so communicated shall only be for the purposes of information/knowledge of the borrower and such reasons will not give him any right to approach the Tribunal under Section 17 of the Act.

25. In our view, Section 17(4) shows that the secured creditor is free to take recourse to any of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force, e.g. For the sake of agreement, if in the given case the measures undertaken by the secured creditor under Section 13(4) comes in conflict with, let us say the provision under the State land and revenue law, then notwithstanding any conflict, the provision of Section 13(4) shall override the local law. This position also stands clarified by Section 35 of the NPA Act which states that the provisions of NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complimentary to each other and, therefore, the doctrine of election has no application to the present case. (Emphasis supplied)

12. I have given careful consideration of the material facts relevant for consideration and also the submissions made by the learned counsel on either side and upon perusing the documents in support of the case, it is seen that the petitioner approached the bank for certain credit facilities and in the transaction, they have the liability. It is also seen that two of the firms have borrowed loans for their business activities and as on 08.03.2002, the total liability was claimed as Rs.1,03,86,184.78 paise; on their failure to discharge their liabilities, the respondent bank has approached the Debts Recovery Tribunal-I and filed O.A. No.118 of 2002 and the same was allowed vide order dated 10.03.2005. There was also a proposal by the borrowers and they approached the respondent bank on 10.11.2006 for a One Time Settlement. There were

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

certain discussions about payments and the petitioner expressed his willingness to pay Rs.30 lakhs as One Time Settlement before 10.03.2007, whereas the respondent bank demanded 25% of the offer amount as down payment. Thereafter, the borrowers arranged repayment of Rs.5 lakhs and in the accompanying letter dated 13.03.2007, the petitioner promised to pay the remaining sum of Rs.25 lakhs towards full and final settlement by 31.03.2007. However, there was a balance amount not paid by the petitioner and the respondent bank has contemplated further action and issued notice under Section 13(2) of the Act on 02.01.2007. At this stage, the petitioner has chosen to contest the matter to raise whatever the claim and counter claim in respect of payment and the balance consideration. Instead of contesting the matter, the petitioner approached this Court contending that the respondent has acted in contravention of Section 13(3-A) of the Act which reads as under:

> "If, on receipt of the notice under sub-section(2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower."

13. The learned Senior Counsel for the petitioner submitted that in response to the notice dated 02.01.2007 issued under Section 13(2) of the Act, a reply letter dated 18.04.2007 was sent by the petitioner, for which the respondent Bank did not respond to. However, the petitioner has produced the letter dated 02.06.2007 sent by the respondent bank and the relevant portion of the said letter is as below:

> "Sub: One Time Settlement Proposal of your a/c M/s. Adword and M/s. Karvin Corporation:
>
> This has reference to your letter dated 18.04.2007 addressed to us on the captioned subject. In this regard we would like to inform you that the improved offer of Rs.33.00 lacs in respect of the settlement of above two a/cs under OTS scheme is not acceptable by the bank. We have been instructed by our higher authorities to bring the E.M. properties for sale/auction under the Securitisation Act, immediately to recover our dues."

He also disputed the date of communication of the above reply sent by the respondent and that as per the said document furnished by the petitioner in the additional typed set of papers, the respondent cannot proceed with a notice for possession under Section 13(4) of the Act and it can be issued by the bank only for reasons of non-acceptance and the settlement.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

14. I am unable to accept the argument of the learned Senior Counsel appearing for the petitioner as Section 13(3-A) of the Act which was incorporated by the Amending Act 30 of 2004, provides that if, on receipt of the notice under Section 13(2), the borrower makes any representation or raises any objection, the secured creditor must consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. This provision has been obviously incorporated in the light of the decision of the Supreme Court in Mardia Chemicals case. In the Mardia Chemicals case, the Supreme Court held that under Section 13(2) of the Act, it is incumbent upon the secured creditor to serve sixty days notice before proceeding to take action under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections howsoever brief that may be must be communicated to the borrower. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage. The Court explained that communication of reasons not to accept the objections of the borrower is for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor, who intends to resort to harsh steps of taking further action. Such person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason for non-acceptance of his objections.

15. This is with an object to provide a fair opportunity to the petitioner to know the developments immediately before taking measures under Section 13(4) of the Act. However, it is made clear that as per the provisions of the Act, the borrower will not be entitled to challenge the reasons communicated or the likely action of the secured creditor at the stage of the communication of the reasons, unless his right to approach the Debts Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) Section 13 of the Act. The proviso to sub-section (3-A) of Section 13 of the Act makes it abundantly clear that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A of the Act. Thus, the basic object of Section 13 (3-A) of the Act is to ensure the element of transparency and fair play in the implementation of the provisions of the Act.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

16. In the instant case, the respondent bank has complied with the provisions of the Act and has sent a reply and therefore, when there is a substantial compliance of the provision under Section 13(3-A) of the Act, the petitioner has no manner of right to claim the non-compliance of the provision of Section 13(3-A) by the respondent bank. Therefore, I am of the considered opinion that the petitioner has not made out any case for consideration of the prayer for a writ of mandamus to sustain the relief sought in the petition and accordingly, there is no merit in the writ petition and the same is liable to be dismissed. However, the petitioner is at liberty to approach the Debts Recovery Tribunal of the jurisdiction concerned within a period of two weeks from the date of receipt of a copy of this order and till such time, the parties are directed to maintain status quo as on date.

Accordingly, the writ petition is dismissed with the above direction. Consequently, connected M.P.No.1 of 2007 is closed.

abe

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

Union Bank of India,
Nungambakkam Branch,
No.37, College Road,
Chennai 600 006.

+2 ccs to Mr.Ahmad Associates, Advocate Sr.No.75226.

BV(CO)
DCP/11.1

W.P.No.19445 of 2007

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/